

FILE COPY

IN THE

CHARLES ELWOOD THOMAS

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 605 :

JACOB SIEGEL COMPANY,
Petitioner,

v.

FEDERAL TRADE COMMISSION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT
NO. 8407 AND BRIEF IN SUPPORT THEREOF.

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Jacob Siegel Company,

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v.

Federal Trade Commission,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT.**

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES
OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the Decree of the Circuit Court of Appeals for the Third Circuit, entered October 9, 1944, affirming and enforcing the cease and desist order of the Federal Trade Commission entered April 28, 1943.

Opinion Below.

The opinion of the Circuit Court of Appeals is reported at 150 Fed (2d) 751 and is printed in the Record at p. 891.

Basis of Jurisdiction.

Jurisdiction is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938. The opinion of the Circuit Court of Appeals for the Third Circuit was filed November 30, 1944; a petition for rehearing was granted March 6, 1945; and its opinion confirming its original decision was filed September 20, 1945. A stay of the enforcement order pending this petition was entered October 12th, 1945 (R. 920).

Questions Presented.

(1) Whether a Circuit Court of Appeals may modify an order of the Federal Trade Commission which it believes harsh and unreasonable, as was held proper in the case of **Federal Trade Commission v. Royal Milling Co.**, 288 U. S. 212 (1933), and **Federal Trade Commission v. Hires Turner Glass Co.**, 81 Fed. (2d) 362 (1936) (C. C. A. 3).

(2) Whether this Court has the right, asserted in the **Royal Milling case**, to modify an order of the Federal Trade Commission which it may believe harsh and unreasonable.

Summary Statement.

Jacob Siegel Company has been manufacturing overcoats in Philadelphia for over 30 years, and since 1930 from a cloth it developed made of alpaca, mohair and wool fibres on a cotton backing. In that year it gave the name "Alpacuna" to the coats. About two years later the company brought out a top coat bearing the same name made of cloth of the same fibres, but, to make it lighter, the cotton backing was eliminated.

The Federal Trade Commission found the name "Alpacuna" is deceptive to a substantial portion of the purchasing public, in that it implies to such persons that the coat is made of the hair of a rare animal known as

the vicuna, which lives high in the Andes of South America.

There was a dissent by one of the Commissioners who felt the name was not deceptive per se, that it was a valuable name and ought not be destroyed.

The coat contains 50% alpaca and 10% mohair. The balance is wool. It was called alpaca-una, or Alpacuna, because of its large alpaca content. The "una" was a fanciful suffix.

There was no evidence at all that anyone had ever been deceived, but Government witnesses, who were experts in the business, testified they would take the word to imply that the garment contained vicuna fibre, notwithstanding an Alpacuna coat cost \$40. and one of vicuna would cost around \$900.

A cease and desist order was entered and the company sought review by the Circuit Court of Appeals for the Third Circuit. That Court stated in its opinion as follows (R. 898):

"Although we sustain the Commission on its finding as to the name because of substantial evidence supporting that finding, we think strongly that the order is far too harsh. It destroys a widely and favorably known trade name, in existence for fourteen years. It causes serious injury to the petitioner and its retail outlets. The infraction, as the case now stands, is slight and could be cured by simple qualifying language. We could dispose of the problem by modifying the Commission's order as suggested, if the practice as outlined in *Federal Trade Commission v. Royal Milling Co.*, 288 U. S. 212 and *Federal Trade Commission v. Hires Turner Glass Co.*, *supra*, a Third Circuit case, was still the law. While the Supreme Court has not dealt with the question of remedy in a Fair Trade Commission suit since the *Royal Milling* case, there have been a number of opinions from that court concerning remedies pre-

scribed by the Labor Board. In those cases the court has forcibly pointed out that the matter of remedy is also for the administrative agency"

A re-argument was granted upon a showing that other Circuits have been modifying orders of the Federal Trade Commission, but on September 20, 1945, the earlier decision was affirmed.

Reasons for Granting the Writ.

In the case of

Royal Milling Co. v. Federal Trade Commission, 288 U. S. 212 (1933),

the Federal Trade Commission found that the use of the word "milling" by the company in its name was deceptive because it was found to imply that the company ground its own grain, whereas, in fact, it blended flours. A Cease and Desist Order was entered based on evidence that "milling" was deceptive. The Circuit Court of Appeals for the Sixth Circuit affirmed. This Court reversed and remanded the case because the remedy of destroying a name long and honorably in use was too harsh. Simple qualifying words would remove the possibility of deception.

The same reasoning was followed by the Circuit Court of Appeals for the Third Circuit in the case of

Federal Trade Commission v. Hires Turner Glass Co., 81 Fed. (2d) 362 (1935)—C. C. A. 3.

The decision below is in conflict with the prior decision of the same court in the Hires Turner Glass Co. case and with the decision of this Court in the Royal Milling Co. case.

In the case of

Medo v. National Labor Relations Board, 321 U. S. 678 (1944). Decided April 10, 1944,

this Court held that the matter of remedy was for the National Labor Relations Board to decide. That case does not overrule the Royal Milling Co. case. There was no occasion for doing so. Nevertheless the Circuit Court of Appeals in this case has held the Royal Milling Co. case overruled by the Medo case.

Since the Medo case, numerous decisions have been made by Circuit Courts of Appeal in which those courts have, in fact, modified orders of the Federal Trade Commission with respect to the remedy. These cases are as follows:

Dietzgen Co. v. Federal Trade Commission, 142 Fed. (2d) 321 (1944)—C. C. A. 7. Decided May 3, 1944;

Ultra-Violet Products, Inc. v. Federal Trade Commission, 143 Fed. (2d) 814 (1944)—C. C. A. 9. Decided June 30, 1944;

Gelb v. Federal Trade Commission, 144 Fed. (2d) 580 (1944)—C. C. A. 2. Decided August 14, 1944;

Lekas & Drivas v. Federal Trade Commission, 145 Fed. (2d) 976 (1944)—C. C. A. 2. Decided November 30, 1944.

The decision of the Circuit Court of Appeals in this case is in conflict with all the above decisions in other circuits.

Therefore Petitioner submits that this Court may take jurisdiction of this case:

1. Because the decision below is in conflict with the latest decision of this Court;
2. Because the decision below is in conflict with the decisions of other Circuit Courts of Appeal set out above;
3. Because under the case of

Helvering v. Safe Deposit and Trust Co., 316 U. S. 56 (1942),

this case is of general importance in deciding whether there may be any judicial review of a decision by the Federal Trade Commission to destroy unnecessarily a trade mark of long standing which so far has not deceived any one.

Wherefore it is respectfully submitted that this Petition for Writ of Certiorari to review the decision of the Federal Trade Commission, as affirmed by the Circuit Court of Appeals for the Third Circuit, should be granted.

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BRIEF.**In Support of Petition for Certiorari.****Basis of Jurisdiction.**

Jurisdiction is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938. The opinion of the Circuit Court of Appeals for the Third Circuit was filed November 30, 1944. A Petition for Rehearing was granted March 6, 1945, and the court's original opinion confirmed in a final opinion filed September 20, 1945. An enforcement order was entered October 9, 1945, and the enforcement thereof stayed to afford time for presentation of the issue to this Court.

Statement of the Case.

This is a petition to review a cease and desist order issued by the Federal Trade Commission directing the Petitioner to stop using the word "Alpacuna" on overcoats on the ground that the word is a misleading representation that the coats contain the hair of an animal called the "Vicuna" found only in the region of the Andes Mountains of South America. The coats do contain Alpaca fibre to the extent of about fifty per cent, and the name is a fanciful one invented by the Petitioner years

ago by combining the words "Alpaca" and "una", signifying exclusiveness.

The original complaint was filed on May 6, 1938. It charged the Petitioner with issuing samples, books and advertising copy, representing that the garments were made of all wool and hair fabric. There was no complaint about the use of the name "Alpacuna."

A settlement of the controversy was tentatively agreed upon between counsel for the parties, but was finally ignored by the Commission. Its counsel was changed for some reason unknown to the Petitioner and an amended complaint issued. This complaint contained additional allegations, including a complaint that the use of the term "Alpacuna" constitutes (R. 6a) "a representation by said respondent (Petitioner here) . . . that said fabric is composed entirely of the fur, wool or hair of the Alpaca and the Vicuna," and that it gave unscrupulous retailers means of increasing their sales "by representing that said overcoats and topcoats are all wool and composed solely of the fur, wool and hair of the Alpaca and Vicuna." A further complaint was made as to certain advertising copy which was claimed to represent that "Alpacuna" fabrics contain "the foreign fur, hair or wool of the Angora goat from the plains of Turkestan."

The Petitioner again filed an answer denying the additional complaints and averring that the name "Alpacuna" was a coined trade name and did not constitute a representation that the "Alpacuna" fabrics were composed of alpaca and vicuna and that, accordingly, it did not place in the hands of unscrupulous retailers a means of misrepresenting the coats.

The case then proceeded to hearing and after counsel for the Commission had conducted a long series of hearings in Philadelphia, New York, Baltimore and Washington he filed a further amended complaint. In this third complaint charges with respect to the term "Alpacuna"

were modified and it was charged that the term represented to the public that the fabric is (R. 280a) "composed entirely, or at least of a substantial quantity of the fur, wool or hair of the alpaca and vicuna." A further charge was made (R. 281a) that the slogan "There Is Only One Alpacuna Coat" was misleading when applied to both Petitioner's topcoats and overcoats, which were not of identical fibre content because of the cotton back on the heavy coat. Answer was again filed by Petitioner substantially denying the additional charges made. Petitioner was then permitted to put in its case. Testimony was taken before the Trial Examiner who filed his report without making any recommendation. Exceptions were taken and argued before the Commission with the result that a majority of the Commission endorsed an opinion directing the cease and desist order complained of. Commissioner Freer dissented (R. 655a).

The basic facts are that the Petitioner makes two overcoats, one a heavy coat, and the other a topcoat. They differ in character only that the heavy winter coat has a cotton back. On the topcoat, the cotton back is omitted. The face fabric was composed of 50% alpaca, and 20% mohair and 30% wool. The face yarns comprised 70% of the total fabric and the cotton back 30%.

The alpaca used in the fabric is known in the trade as Araqueppa alpaca. It is the only alpaca which can be obtained commercially and contains between 10% and 15% guanaco (hair from another small animal) (R. 539a, 540a, 541a; Petitioner's Ex. A with Answer, 17a). The mohair used in the fabric is obtained from Texas. The Angora goats of Texas produce as fine a mohair as the goats from Asia Minor (551a, 552a).

The fabric was designed for overcoats and when Petitioner placed the overcoats on the market it introduced them and sold them under the Company's trade name "Alpacuna," which was duly registered in the Patent Office as a trade-mark for "Men's topcoats, overcoats and suits in Class 39, clothing."

After the Commission issued its cease and desist order directing the Petitioner to stop using the trade name "Alpacuna", a petition for review was taken to the Circuit Court of Appeals. At the argument before the Circuit Court of Appeals, it developed that the Commission meant exactly what its order said. It proposed to stop completely the use of the trade name "Alpacuna" and it would not permit any modification of the word such as the addition of the words "contains no vicuna."

The Circuit Court of Appeals affirmed with considerable reluctance, as evidenced by the following excerpt from its opinion:

"Although we sustain the Commission on its finding as to the name because of substantial evidence supporting that finding, we think strongly that the order is far too harsh. It destroys a widely and favorably known trade name, in existence for fourteen years. It causes serious injury to the petitioner and its retail outlets. The infraction, as the case now stands, is slight and could be cured by **simple qualifying language**. We could dispose of the problem by modifying the Commission's order as suggested, if the practice as outlined in *Federal Trade Commission v. Royal Milling Co.*, 288 U. S. 212 and *Federal Trade Commission v. Hires Turner Glass Co.*, *supra*, a Third Circuit case, was still the law" (R. 898). (Emphasis supplied.)

Meanwhile the Petitioner changed its labels to conform with the copies attached later on in this brief. The labels now used show in conspicuous type beneath the word "Alpacuna" the words "contains no vicuna." A petition for rehearing was filed with the Circuit Court of Appeals. In granting this petition, the court entered the following order:

"After due consideration, the Petition for Rehearing in the above entitled case is hereby granted."

said rehearing to be restricted to possible modification of the Federal Trade Commission's order" (R. 915).

Thereafter, the Circuit Court of Appeals on September 20, 1945, filed its opinion upon rehearing, as follows:

"After carefully considering the question of possible modification of the Federal Trade Commission's order, we feel compelled to adhere to our original decision which we confirm" (R. 916).

At the argument on rehearing, Petitioner presented to the Circuit Court of Appeals the modified labels referred to and asked that the enforcement order be modified to permit the use of this modified label. The court would have been entirely willing to permit this modification, but counsel for the Commission refused to agree.

The enforcement order was entered without modification, and Petitioner filed this petition for certiorari.

Specifications of Errors Urged.

The Petitioner urges the following errors:

1. The court below erred in holding that it does not have the power to modify a remedy prescribed in a Federal Trade Commission cease and desist order which it believes to be unnecessarily harsh and destructive.

2. The court below erred in failing to hold the order of the Commission unconstitutional and void insofar as it unreasonably and unnecessarily destroys a valuable trade name.

Summary of Argument.

The name "Alpacuna" has never deceived anybody. The Commission has found it may in the future be deceptive because some experts brought in by it as witnesses stated they would interpret the name to mean the garment contained some vicuna fibre notwithstanding they knew it did not. Based on its finding of possible deception, resting on this evidence, the Commission ordered the destruction of this trade name and refuses to permit any neutralizing language such as "contains no vicuna." The Circuit Court of Appeals has concluded that it is without power to modify the remedy prescribed by the Commission.

The latest Federal Trade Commission case is

Federal Trade Commission v. Royal Milling Company, 288 U. S. 212 (1933).

This case has never been expressly overruled, but the Court of Appeals regards it as having been overruled by implication by the case of

Medo Photo Supply Corporation v. National Labor Relations Board, 321 U. S. 678 (1944).

Petitioner does not believe the Federal Trade Commission has unlimited power to impose an unreasonable remedy, and asks this Court to permit the Circuit Court of Appeals to modify the cease and desist order as it has announced it would do if it had the power or else to enter an order of modification in these proceedings.

Argument.

The cease and desist order directs the Petitioner not to use the name "Alpacuna" notwithstanding it has used that name for fourteen years without evidence of deception to any customer. In its Opinion, the Circuit Court of Appeals states (R. 898):

"Although we sustain the Commission on its finding as to the name because of substantial evidence supporting that finding, we think strongly that the order is far too harsh. It destroys a widely and favorably known trade name, in existence for fourteen years. It causes serious injury to the petitioner and its retail outlets. **The infraction, as the case now stands, is slight and could be cured by simple qualifying language. We could dispose of the problem by modifying the Commission's order as suggested if the practice as outlined in Federal Trade Commission v. Royal Milling Co., 288 U. S. 212 and Federal Trade Commission v. Hires Turner Glass Co., supra, a Third Circuit Case, was still the law.**" (Emphasis supplied).

The court then proceeds to state that it would dispose of the problem by modifying the Commission's order as suggested were it not for the fact that the court feels it has no power to do so. Therefore, the court concludes its opinion by affirming the order of the Federal Trade Commission, with which it thus disagrees.

Petitioner believes the court has the power to modify the order of the Commission along the lines indicated on either of two theories—First, the order is exceedingly harsh, and is, therefore, an abuse of discretion; and Secondly, there is no substantial evidence that the proposed qualifying words "contain no vicuna" would be ineffective. Therefore, the order is to that extent not supported by evidence. The latest case in this Court on the subject dealing with the Federal Trade Commission is

Federal Trade Commission v. Royal Milling Company, 288 U. S. 212 (1933).

In this case, the Commission entered a cease and desist order, and this Court stated (p. 217):

“Although we sustain the commission in its findings and conclusions . . . we think under the circumstances the commission went too far in ordering what amounts to a suppression of the trade names.”

This Court thereupon reversed the Circuit Court of Appeals, and sent the case back for the entry of a modified order less drastic than the destruction of the trade name involved in that case. This is the last case in this Court having to do with the subject-matter of trade names before the Federal Trade Commission.

The Circuit Court of Appeals was aware of the Royal Milling Company case, but considered it overruled by later cases in this Court dealing with the review of orders of the National Labor Relations Board. Petitioner believes that there is a different purpose to be served in labor relations cases, as well as different statutory provisions prescribing the review of the two types of administrative cases.

To begin with, labor relations cases often require supervision. In other words, an employer is required by order to recognize or deal with a particular Union, or not to recognize or deal with it, in his daily contact with his employees. Questions of administration of the orders constantly come up. There are sometimes elections to be held and supervised by the Board. Seldom will a mere cease and desist order suffice. Therefore, this Court has broadly stated in labor cases that it will not interfere with the methods adopted by the Board. Presumably, it would do so if those orders violated some provision of the Constitution, or perhaps some provision of a statute.

Suppose, for instance, the Labor Relations Board should order the president of a corporation employer, or the leader of an insurgent Union, shot at sunrise. No jury trial having been held, nor indictment found, it is hard to believe this Court would not say such an order was invalid, notwithstanding the Board's opinion as to the necessity for such action to accomplish labor representation in that industry.

This Court, doubtless, would say that the order was invalid because it bore no true relation to the object to be accomplished. It might say the order directed a desirable result, but was invalid because prohibited by Constitutional restriction.

The Petitioner believes this case is such a type. The object to be accomplished is the prevention of public deception or misbranding. The Act itself sets forth the policy as follows:

Act of September 26, 1914, c. 311, Sec. 5 38 Stat. 719; 15 U. S. C. A. 45, as amended.

"The Commission is hereby empowered and directed to prevent persons . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

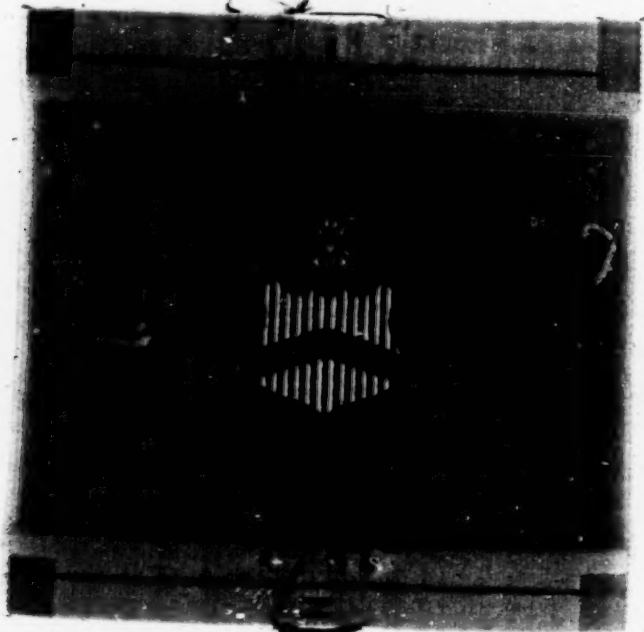
There seems to be no doubt that the use of the word "Alpacuna" upon a garment made of animal fibres is not a wrong in and of itself. The complaint of the Commission goes no further than to say that the use of the word on a garment containing alpaca, but no vicuna, is wrong because tending to be deceptive. The alleged deception is considered to lie in the connotation supposed to reside in the word "Alpacuna"—that the garment contains vicuna fibres. Vicuna fibre is present only in minute proportions, and quite unintentionally.

Petitioner believes that the word "Alpacuna" is not an evil word, *per se*. Such deception as the Commission

charges arises only by inference. No one ever was deceived. The only evidence to support the charge of deception is testimony by **experts** that they might be deceived, but weren't.

Thus, it is factually clear in this case that the only wrong to be cured is the supposed representation that vicuna fibre is present, when, in fact, it is not. Petitioner believes a direct statement on the label and immediately under Alpacuna "contains no vicuna" in conspicuous type would effectively negative any import the mark might carry to the contrary.

Since the opinion of the Circuit Court of Appeals was handed down November 30, 1944, Petitioner has devised and is using new labels showing the name prominently modified: "Alpacuna Contains No Vicuna." Samples of these labels are as follows:



ALPACUNA OVERCOAT

REG. U.S. PAT. OFF.

CONTAINS NO VICUNA**CONTENTS:**

FACE: 80% ALPACA & MOHAIR

40% VIRGIN WOOL

BACK: 100% LONG STAPLE COTTON

FACE CONSTITUTES 68% OF

FABRIC AND BACK 32%

DISTRIBUTED BY**ALPACUNA TOPCOAT**

REG. U.S. PAT. OFF.

MFR. No. 278**CONTENTS: 80% ALPACA & MOHAIR****40% VIRGIN WOOL****CONTAINS NO VICUNA****DISTRIBUTED BY**

The statement of fibre content is now required by the Wool Products Labeling Act; 54 Stat. 1128; 15 U. S. C. A. sec. 68.

The destruction of the mark goes beyond any necessary restriction. Destruction of the mark will, of course, be completely effective;—the liquidation of the Jacob Siegel Company would also be effective. Petitioner believes that any administrative remedy not reasonably limited to the object directed to be achieved by statute is a destruction of property and unconstitutional.

The Petitioner, therefore, respectfully reiterates that it believes this Court and the Circuit Court of Appeals have authority to limit the remedy to what is fairly related to the object to be accomplished, and if need be, to modify the administrative order. The Royal Milling case so holds.

The cases in this Court wherein this Court refuses to control the remedy in labor cases should not be extended to Federal Trade Commission cases because of the dif-

ferences in the character of the remedies and the differences in the statutes.

The National Labor Relations Act, 29 U. S. C. Section 160, provides; 49 Stat. 453:

“(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice * * * **affecting commerce.** This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law or otherwise.” (Emphasis added.)

Affecting commerce is defined in Section 2, 29 U. S. C. 152 (7); 49 Stat. 450:

“(7) The term ‘affecting commerce’ means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.”

No such broad language is found in the Federal Trade Commission Act, 15 U. S. C. 45, which provides:

“(a) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.”

Both statutes give to the respective commissions conclusive jurisdiction upon the finding of facts. The two commissions, however, are quite different in purpose, and the statutory words prescribing their powers are different.

Thus “unfair methods of competition” is the Federal Trade Commission field of attack. “Tending to lead to a labor dispute” is the Labor Relations field. If the

same scope were given to the Federal Trade Commission, that Act would give that Commission power "to prevent persons . . . from using unfair methods of competition which may tend to lead to deception." (Emphasis added.) But the statute contains no such language. So even if we concede that both Commissions have exclusive jurisdiction over choice of remedy, the field within which the remedy may be reasonably applied is vastly greater in the National Labor Relations Act. The Federal Trade Commission is not given power to stop practices which "tend or lead" to deception, but only "unfair or deceptive acts or practices in commerce."

The difference in scope between the two Acts has been the subject of comment a number of times by this Court.

Polish National Alliance v. National Labor Relations Board, 322 U. S. 643. Decided June 5, 1944.

This case involved the question of the application of the National Labor Relations Act to an association of lodges which carried benefits or insurance upon members of fraternal organizations. In discussing the breadth of the Labor Relations Act, Mr. Justice Frankfurter states at page 647:

" . . . And so in this Act, unlike some federal regulatory measures, see *Federal Trade Commission v. Bunte Bros.*, 312 U. S. 349, 351; *Kirschbaum Co. v. Walling*, *supra* at 522-523, Congress has explicitly regulated not merely transactions or goods in interstate commerce but activities which in isolation might be deemed to be merely local but in the interlacings of business across state lines adversely affect such commerce. By the Wagner Act, Congress gave the Board authority to prevent practices 'tending to lead to a labor dispute burdening or obstructing com-

merce or the free flow of commerce.' §2 (7) of the National Labor Relations Act (49 Stat. 449, 450, 29 U. S. C. A. §152 (7)). Congress therefore left it to the Board to ascertain whether prescribed practices would in particular situations adversely affect commerce when judged by the full reach of the constitutional power of Congress. Whether or no practices may be deemed by Congress to affect interstate commerce is not to be determined by confining judgment to the quantitative effect of the activities immediately before the Board. Appropriate for judgment is the fact that the immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce."

On the other hand, there is the case of

Federal Trade Commission v. Bunte, 312 U. S. 349 (1941). (Decided February 17, 1941.)

In this case, the Commission tried to prevent a candy manufacturer within a state from selling what was called "break and take" assortments, on the ground that this was an unfair method of competition. Mr. Justice Frankfurter pointed out that while this might affect commerce, it was not in commerce, as set forth in the Federal Trade Commission Act. He discusses the difference between the two Acts beginning at page 351, as follows:

"... When in order to protect interstate commerce Congress has regulated activities which in isolation are merely local, it has normally conveyed its purpose explicitly. See for example, National Labor Relations Act, §§2 (7), 9 (c), 10 (a), 49 Stat. 450, 453, 29 U. S. C. §§152 (7), 159 (c), 160 (a); Bituminous Coal Act, §4 A, 50 Stat. 83, 15 U. S. C. §834; Federal Employers' Liability Act §1, 35 Stat.

65, as amended, 53 Stat. 1404, 45 U. S. C. §51. To be sure, the construction of every such statute presents a unique problem in which words derive vitality from the aim and nature of the specific legislation. But bearing in mind that in ascertaining the scope of congressional legislation a due regard for a proper adjustment of the local and national interests in our federal scheme must always be in the background, we ought not to find in §5 radiations beyond the obvious meaning of language unless otherwise the purpose of the Act would be defeated. *Minnesota Rate Cases*, 230 U. S. 352, 398-412.

"That for a quarter century the Commission has made no such claim is a powerful indication that effective enforcement of the Trade Commission Act is not dependent on control over intrastate transactions. Authority actually granted by Congress of course cannot evaporate through lack of administrative exercise. But just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred."
(Emphasis added.)

The fact that the Commission for many years has been restrained by the courts in its efforts to regulate every practice which might remotely affect commerce is a strong indication that the Commission does not have the power to bar everything which may remotely touch commerce, and is a clear indication that the courts do have power to restrain the Commission in the application of an unduly severe remedy.

For years the courts have been in the habit of modifying orders of The Federal Trade Commission. In the past the Commission has not sought to prevent

modification by mandatory rule of law but only to persuade the courts against it. This lack of objection is a strong indication of what the law is.

Petitioner believes that even if the use of the word "Alpacuna" is deceptive, the use of the words "Alpacuna, contains no vicuna" is not deceptive. It may be that in choosing a new mark or trade name today, the choice of such a slogan would be unwise. However, in view of the fact that "Alpacuna" has been used for fourteen years, with no evidence of deception, the use of the phrase "Alpacuna, contains no vicuna" could be objectionable only on the ground that it might set a bad example for others. In this way it might be stated to "tend to lead" to deception by others, but the jurisdiction of the Commission does not extend so far as to enjoin such practices, which in themselves, are inoffensive merely on the ground that they may set a bad example for others. Under the Federal Trade Commission Act, the practice must be an unfair or deceptive act in commerce. Petitioner, therefore, believes that the Commission has gone beyond its power in ordering the obliteration of a trade name merely because it believes that the practice of the past, if continued into the future, might become deceptive.

Apparently recognizing the difference, the Circuit Court of Appeals for the Ninth Circuit quite recently did modify the remedy applied by the Federal Trade Commission in a cease and desist order.

**Ultra-Violet Products, Inc. v. Federal Trade Commission, 143 Fed. (2d) 814 (1944)—C. C. A. 9.
(Decided June 30, 1944.)**

Here the question was about the extent to which the advertising of a ray lamp correctly represented its therapeutic powers. The Commission ordered the cessation of seven types of advertising. The court refused

to enforce two of the orders, affirmed four, and modified one. As to the latter, the court states (p. 817):

"Regarding the prohibition against advertising that the lamp 'normalizes the chemistry of the body, improves metabolism, or builds new tissues, except insofar as its use **may** result in the production of vitamin D,' we agree that it should be modified as requested by the petitioner to read to prohibit the statement that the lamp 'normalizes the chemistry of the body, improves metabolism, or builds new tissues, except insofar as such effects are related to the production of vitamin D resulting from the use of the lamp'." (Emphasis supplied.)

Thus, the court restricted the order to what was necessary to prevent untrue statements.

In the case of

Parke, Austin & Lipscomb v. Federal Trade Commission, 142 Fed. (2d) 437 (1944)—C. C. A. 2. (Decided April 19, 1944.)

Judge Chase states, as quoted in the opinion of the Circuit Court of Appeals in the present case (R. 901) states at page 441:

"The petitioners are standing upon much firmer ground when they insist that this paragraph in the order is needlessly severe in its sweeping requirement that the words 'Smithsonian Institution' must be eliminated from the corporate name of petitioner Smithsonian Institution Series, Inc. There may well be some alternative remedy less drastic but adequately effective which might satisfy the requirements of fairness and should be adopted. On this record, however, we cannot be sure that the Commission has abused its discretion in this respect, and only in that event should we interfere with its action."

The indication is that the court would have modified the order in case of an abuse of discretion. The Circuit Court of Appeals in the case at bar concludes its opinion as follows (R. 902):

"That discretion has been exercised to totally prohibit the use of the name 'Alpacuna' to the petitioner. Since the Commission has such power, we are unable, in view of the evidence, to say that the power has been abused in this instance, though under the same facts and circumstances, if we were still in control of the remedy, we would modify the order as above indicated."

Petitioner submits that it is an abuse of discretion to destroy an established trade name made valuable by many years of advertising where the addition of the words "contains no vicuna" will serve effectively to prevent the deception the Commission fears may, but as yet has not occurred.

The only issue of fact before the Commission was whether "Alpacuna" was deceptive. There was no question about whether "Alpacuna Contains no Vicuna" is deceptive. There is no evidence on this point. In the Ultra-Violet case, there was evidence that the advertising was partly true. The Circuit Court of Appeals refused to permit a blanket cease and desist order. So here, this Court may regard the question of the modified name as not supported by any evidence. If the Court takes that position, the cease and desist order should be modified to conform to the evidence.

Thus, this Court may either regard the Order as unreasonable and an abuse of discretion, or it may fairly regard it as wholly unsupported by evidence so far as designed to prevent the use of "Alpacuna. Contains no Vicuna."

The Federaal Trade Commission Act expressly provides that the appellate court "shall have power to make

and enter, upon the pleading, evidence, and proceedings set forth in such transcript a decree **affirming, modifying or setting aside** the order of the Commission, and enforcing the same to the extent that such order is affirmed * * *." (Emphasis added.)

**52 Stat. 111; 15 U. S. C. A. Sec. 45 (c), and
52 Stat. 111; 15 U. S. C. A. Sec. 45 (d).**

There seems to be no general idea among the Circuit Courts of Appeal that the decisions of this Court in Labor Board cases restrict the right of the Court to modify an order of the Federal Trade Commission. As stated in the Circuit Court of Appeals' opinion in this case, the Circuit Court of Appeals for the Second Circuit at first conceived it had this right, and now feels that it does not have the right to modify an order of the Federal Trade Commission. But even that court states in the Parke case that it would do so in case of an abuse of discretion. One of the earlier Second Circuit cases is

Establissemments Rigaud, Inc. v. Federal Trade Commission, 125 Fed. (2d) 590 (1942) (C. C. A. 2).

It appeared that a group of persons, most of whom were French, and lived in France, imported to this country ingredients from which they mixed perfumes in New York. They sold these perfumes under labels indicating the perfumes were imported. A cease and desist order issued which, among other things, prohibited the use of all French words on the label. On petition for review, the court stated as follows (page 591):

"We think the order is too broad. The proceeding against Rigaud and Fougere was calculated to correct abuses which at best were trifling and but for the broad discretion lodged in the Commission we should regard as hardly worth serious consideration. It must, however, be remembered that the ingredients of the perfumes were mainly French and that the

business to a great extent has been supervised by French directors and stockholders. It is notorious that French names are commonly used to describe perfumes and for some reason seem to be favorites with the trade. It is doubtless permissible to forbid the use of words which indicate a French origin and manufacture when *strictissimi juris* there is none, but we can see no reason for proscribing the use of all French words when designating the perfumes or for the rather fantastic requirement of the order that the price of retention must be an accompanying English translation. It is enough to insist upon the abandonment of the words 'Paris' or 'Paris, France' unless they are limited as in clause 1 of the order. We think the most the Commission should require is that Rigaud and Fougere cease and desist from the acts embraced in clauses 1 and 3. *Fioret Sales Co. Inc. v. Federal Trade Comm.* 2 *Circ.*, 100 F. 2d 358.

"The order should be modified by the elimination of clause 2. As thus modified, the order is confirmed and enforcement thereof is granted."

Such of the other Circuit Courts as have had occasion to modify an order of the Federal Trade Commission, have done so without any restraint.

Federal Trade Commission v. Mid West Mills, Inc.,
90 Fed. (2d) 723 (1937)—C. C. A. 7.

In this case, the Commission entered an Order directing the respondent to cease the use of its corporate name "Mid West Mills, Inc." on the ground that its use was likely to make purchasers of woven goods think they were buying from a manufacturer rather than from a jobber. The Circuit Court of Appeals for the Seventh Circuit felt that the name did not need to be destroyed, but could be rendered harmless by the addition of explanatory words.

At page 725, the court states:

"We are convinced that respondent may avoid any false impressions and implications arising from the use of the word 'Mills' if it uses on all its stationery, garment labels, tickets, invoices, and other printed matter, these words 'Jobbers and Converters, Not Mill Owners or Mill Operators.' There would then be no possibility of deception. Of course, these are not the only words which might be adopted. The Commission must in the first instance determine whether the words sufficiently convey the information that respondent neither owns nor operates a mill."

The Commission is now taking the position that qualifying words are not appropriate here because it is impossible to qualify a contradiction. The idea seems to be that anyone who from now on reads the terms "Alpacuna Contains no Vicuna" will first imply from the word "Alpacuna" that it contains Vicuna, and will then be confronted with the words "Contains no Vicuna." Thereupon, he will note the contradiction and will not be sure. Since no one is shown to have been misled by fourteen years' use of the unmodified mark, it is hard to believe the explanation would increase confusion. Petitioner is convinced that its request is reasonable. The court in the above case felt that it was proper for the Petitioner to use the word "Mills" in its name notwithstanding it was not a mill, provided it stated thereon these words:-

"Jobbers and Converters, Not Mill Owners or Mill Operators."

The same was true in the Royal Milling case, and another case to the same effect is as follows:

Federal Trade Commission v. Hires Turner Glass Co., 81 Fed. (2d) 362 (1935)—C. C. A. 3.

In this case, the respondent was in the habit of advertising its mirrors as "copper-backed." It appeared that these words had come to indicate to the trade mirrors backed by a sheet of copper electrolytically applied. The respondent applied its so-called copper back by painting thereon a mixture of shellac and powdered copper. The advertising was, therefore, regarded as deceptive. The Commission directed the respondent to stop using the term "copper-backed." The Circuit Court of Appeals for the Third Circuit affirmed the order. At page 364, Judge Thompson states:

"It may well be that, had this court been a fact-finding tribunal, it might have reached conclusions other than those reached by the petitioner. The petitioner, however, had before it ample evidence upon which to find that the terminology had acquired a secondary meaning, prior to its use by the respondent, and that the respondent's mirrors did not contain the essentials of genuine copper-back mirrors. Inasmuch as it is the duty of the Commission to determine the facts, it is our duty to sustain the Commission if there is any substantial evidence upon which its findings are based."

Thereafter, a petition for modification was filed, and the Commission's order was modified. At page 364, Judge Thompson states further:

"The Commission's cease and desist order is accordingly modified by adding thereto the following: 'Provided, however, that the respondent may use such designations as are accompanied by qualifying terms which clearly signify that the copper backing on its mirrors is not electrolytically applied'."

The court below thus in 1935 felt that it had the right to modify a destructive order of the Commission.

Dietsgen Co. v. Federal Trade Commission, 142 Fed. (2d) 321 (1944)—C. C. A. 7. (Decided May 3, 1944.)

In this case an order of the Federal Trade Commission against certain price fixing practices was approved by the court upon petition for review. The report of the case indicates that the opinion of the court was filed February 29, 1944. The reporter then states: "As Modified on Denial of Rehearing May 3, 1944."

The closing paragraph of the court's opinion reads as follows (page 332):

"The order of the Commission is approved. Counsel for respondent will draw a proposed order and submit it to petitioners, pursuant to the rule of this court respecting the drafting of orders in cases where appeal is taken from a ruling of an Administrative Board. In such order, respondent is directed to modify its order and make it clear that the cease and desist order enjoins petitioners from doing any of the acts or things condemned pursuant to any agreement, combination or conspiracy here found to exist."

Even the Circuit Court for the Second Circuit has recently modified an order of the Federal Trade Commission, notwithstanding its previous announcement in the Herzfeld case (140 Fed. 2d 207) (cited by the court below in its opinion R. 899) that it had no authority to do so.

Gelb v. Federal Trade Commission, 144 Fed. (2d) 580 (1944)—C. C. A. 2. (Decided August 14, 1944.)

The complaint of the Commission in this case had to do with advertising a preparation for shampooing and coloring the hair. A cease and desist order was issued, paragraph 2 of which reads as follows:

"(2) Representing that said preparations recondition the hair, or restore the natural or youthful color of the hair."

In affirming the Order, the Circuit Court of Appeals for the Second Circuit stated in part as follows (p. 583):

"Clause (2) of the order is modified by omitting the words 'recondition the hair or'; as so modified the order is affirmed."

This action is doubtless not to be considered in conflict with the position previously taken by the same court, that it had no power to modify the orders of the Commission. It probably based its modification of the order in this case on the claim that the evidence did not support the Commission's finding that the preparation would not "recondition the hair." While it is possible to explain the case upon the theory that there was no evidence to support the finding, nevertheless it is worthy of note that the court did modify the order of the Commission. In the case at bar, it may also be noted that there is no evidence that the addition of the words "Contains no Vicuna" will be ineffective here. If there is no such evidence, there likewise is no basis for abruptly ordering the respondent to cease and desist altogether from using the word "Alpacuna."

Lekas & Drivas v. Federal Trade Commission, 145 Fed. (2d) 976 (1944)—C. C. A. 2. (Decided November 30, 1944.)

In this case the Commission attacked certain advertising relating to olive oil which was stated to have some slight value as a laxative. The Commission ordered such advertisement to stop. An expert witness had stated that the value of olive oil as a laxative was "Slight, if any." This, the Circuit Court of Appeals for the Second Circuit,

held was not sufficient to support the order which wholly enjoined advertising on that subject. At page 976, the court states:

"For this reason we think that the order: Article I (a), should be supplemented by this suffix: 'except a possible slight value as a laxative.'

"Order modified as above indicated, and, as modified, affirmed."

It is respectfully submitted that the view of the Circuit Court of Appeals, that it does not have power to modify an unreasonable order of the Federal Trade Commission is in conflict with the decision of this Court in the Royal Milling Company case, and is in conflict with all of the foregoing decisions in the other Circuit Courts of Appeal (Second, Seventh and Ninth). This Court may properly, therefore, take jurisdiction of this case and grant the petition. Furthermore, it is of great importance that this Court should re-affirm the Royal Milling Company case in view of the expressions by the Second Circuit Court of Appeals (since disregarded) and by the Circuit Court of Appeals for the Third Circuit in this case.

In addition, it is respectfully submitted that no Commission ought to have the power arbitrarily to destroy a trade name in an unreasonable manner—and doing so is an unconstitutional assumption of power.

It is submitted that the petition should be granted in order that these questions may be fully argued.

Respectfully submitted,

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